IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RELIANCE INSURANCE COMPANY, as subrogee/assignee of HAUSMAN BUS SALES, INC.	)	
Plaintiff,	)	
v.	)	**Case No. 99 C 3366**
BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION f/k/a/ BANK OF AMERICA, ILLINOIS	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Reliance Insurance Company, standing in the shoes of its insured Hausman Bus Sales, has brought a suit for breach of contract against Bank of America (the Bank). Reliance alleges that the Bank breached its contract with Hausman by cashing checks drawn on Hausman's Corporate Deposit Account that were forged by a Hausman employee for his own benefit. Both parties have moved for summary judgment. The Bank's motion for summary judgment is granted. Hausman had a contractual and statutory duty to inform the Bank of unauthorized charges within 30 days of each monthly statement. Hausman never did so, and Reliance's claim as subrogee/assignee is therefore barred. Reliance's motion for summary judgment is denied.

FACTS

In November 1997, Dedrick Miller began a campaign of defrauding his employer, Hausman Bus Sales, Inc. He stole blank corporate checks, filled in his own name (or that of his fiancée) as the payee, and forged the signatures of senior Hausman executives before presenting the checks to the Bank of America. The bank honored 51 of these fraudulent checks worth in the aggregate $300,098.30. When Miller presented the fifty-second check, the Bank noticed that it did not bear the signatures of two authorized signatories. Accordingly, the Bank notified Hausman that it would not honor the last check. The earlier checks ranged in value from $1,260 to $9,978. Miller wrote the last check for $15,692. It is undisputed that each check bore the forged signature of Phyllis Guth, an employee of Hausman who was not among those authorized to sign checks.

An investigation ensued that revealed Miller's defalcation. In its Sworn Statement of Loss, Hausman noted that Miller admitted to the scheme and claimed to have sent all of the funds to pay for the medical expenses of a close friend living with AIDS in northern California. A crime insurance policy issued by Reliance Insurance covered Hausman's loss in its entirety. Hausman assigned any claims against the Bank to Reliance and it is as subrogee/assignee that Reliance has brought suit against the Bank. For convenience, we refer to Hausman throughout this opinion.

Hausman opened account no. 73-96651 in 1989. The Bank asserts that its "routine and consistent practice" at that time was to send a Checking Account Agreement to new customers. George Kyros, a senior account manager at the Bank, states in an affidavit that the Bank "would have sent a copy of the Account Agreement, or another version of the document, to Hausman Bus Sales, Inc., [] when Hausman opened its account with the Bank." Defendant's Motion for Summary Judgment, Exhibit C. The Checking

Account Agreement for Commercial (Non-Consumer) Entities states that the Bank "will send you statements of your Account together with your cancelled [sic] checks. You have 30 days from the date the statement is available for examination to notify us of any unauthorized or missing signatures. . . . If you don't notify us by such date, you waive all claims you may have against us regarding these problems." Defendant's Exhibit A, p. 1. The Account Agreement also states that the Bank "can change the terms of this agreement at any time." *Id.* at 2. In a document entitled "FACTS About Corporate Deposit Account Programs (Illinois)," the Bank gave Hausman notice that the Account Agreement would be amended effective September 1997. The new agreement stated that if Hausman "fail[s] to report checks bearing an unauthorized signature, any alterations or other suspected fraud, we aren't responsible for subsequent forgeries, altered checks or other fraudulent uses of your account by the same person that occur after 30 calendar days from the closing date of the statement containing information about the first forgery, alteration or fraudulent transaction." Defendant's Exhibit B, at p. 32. Finally, the monthly statements sent to Hausman contained the disclaimer that "unless we receive notice of any unauthorized or missing signature, alteration of any item, or any error in this statement, within 30 days after the statement is available for examination or the date it is mailed we shall be entitled to consider that you acknowledge this statement and enclosures to be correct." Defendant's Reply Brief, Exhibit A.

Plaintiff disputes the terms of Hausman's contract with the Bank, arguing that Hausman never expressly agreed to the initial Account Agreement or the amending agreement of September 1997. Plaintiff points out that the Bank cannot produce a signature card signed by a Hausman executive. Phyllis Guth, cash manager of a parent corporation to Hausman, states in her affidavit that she is "not aware of any document governing the Account, other than Hausman's Corporate Resolutions and Hausman letters

designating authorized signatories." Plaintiff argues that Hausman was not bound by the 30-day notification deadline in the Account Agreement. It points instead to paragraph two of Hausman's Corporate Resolutions (Defendant's Exhibit G), where it directed the Bank to honor only those checks bearing two authorized signatures. An alleged violation of this contractual duty forms the core of plaintiff's complaint.

LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The non-movant is entitled to a review of the facts by this Court that draws every reasonable inference in its favor, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986), but it "may not rest upon the mere allegations or denials of the adverse party's pleading, [rather it] must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e).

As a federal court exercising diversity jurisdiction over this Illinois dispute, this Court must approach the substantive legal issues guided by Illinois law as announced in relevant statutes and decisions of the Illinois Supreme Court. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). In addition to the controlling precedents of the Illinois Supreme Court, the decisions of intermediate appellate courts "should normally be followed by a federal court sitting in that state." 19 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE § 4507 & n. 43 (2d ed. 1996) (citing *Rekhi v. Wildwood Industries, Inc.*, 61 F.3d 1313 (7th Cir. 1995)). Where there is no Illinois case law (of any stature) directly on point, this Court will look for other indicia of state law, including Illinois court dicta and the decisions of other judges in this circuit who have analyzed comparable UCC sections and/or fact patterns. *See, e.g., Ohio Casualty Ins. Co. v.*

Bank One, 95 C 6613, 1996 WL 507292 at *6 (N.D. Ill. 1996) (citing only *Appley v. West*, 832 F.2d 1021, 1032 (7th Cir. 1987) for support in holding that an earlier Illinois version of UCC § 4-406 did not bar a suit premised on embezzlement by an authorized signatory). If this Court can find no firm guidance in case law, Professor Wright has written that "a federal district court sitting in diversity of citizenship jurisdiction may consider all of the available legal sources," including Restatements, treatises, law review articles, and "judicial decisions from other jurisdictions whose doctrinal approach to legal matters is substantially the same as that of the forum state." 19 WRIGHT, MILLER & COOPER, *supra* at § 4507. We must choose the rule that we believe the Illinois Supreme Court, "from all that is known about its methods of reaching decisions and the authorities it tends to rely on, is likely to adopt sometime in the not too distant future." *Id*. *See also Twohy v. First National Bank of Chicago*, 758 F.2d 1185, 1190 (7th Cir. 1985) (analyzing the choice of law decisions of other jurisdictions to "determine whether the Illinois courts are likely to adopt" the prevailing rule).

The standard approach to non-Illinois case law is exemplified by *Floor v. Melvin*, 5 Ill.App.3d 463, 283 N.E.2d 303 (1972). The *Floor* court stated that while "we agree with plaintiff that decisions of another state would not overrule the law of Illinois, we believe that decisions of courts of the respective states, where relevant, should be examined for such value as Illinois courts may find in them when out-of-state courts have construed certain language and Illinois courts have not. Parties to an appeal in fact have an obligation, when no Illinois authority is in point, to cite existing appropriate authority from other jurisdictions when available." *Id.* at 467, 382 N.E.2d at 306 (citing *Kelley v. Kelley*, 317 Ill. 104, 147 N.E. 659 (1925)). This is especially true with respect to uniform statutes such as the UCC, where the law has expressed a preference for uniformity among the various states. *See, e.g., National Bank of*

Monticello v. Quinn, 126 Ill.2d 129, 139, 533 N.E.2d 846, 851 (1989) (citing and following a New York decision that interpreted Article 4 of the UCC).

ANALYSIS

The Bank argues in its motion for summary judgment that Hausman had a duty to notify the Bank of any unauthorized charges within 30 days of each account statement. It claims that Hausman's failure to do so bars plaintiff's claim. The first question we must answer is whether the Bank is correct in asserting that the terms of its contract with Hausman included a 30-day notification deadline.

The relationship between the Bank and Hausman is governed by the Illinois version of the Uniform Commercial Code. The relevant section of the UCC is § 4-406, entitled "Customer's duty to discover and report unauthorized signature or alteration." 810 ILCS 5/4-406. This section imposes on Hausman a duty to inspect checking account statements if the Bank provides them. In relevant part, it holds that

> (c) If a bank sends or makes available a statement of account or items pursuant to subsection (a), the customer must exercise *reasonable* promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should *reasonably* have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.
>
> (d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c), the customer is precluded from asserting against the bank:
>
> (1) the customer's unauthorized signature or alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and
>
> (2) the customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank.

Id., § 4-406(c) & (d) (emphasis added). Section 4-406(c) imposes a duty on Hausman to inspect monthly statements with "reasonable promptness." If the Bank can prove a failure to inspect and notify, then Hausman is "precluded from asserting against the bank . . . the customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank."

The parties may vary the effect of the Code by agreement. *Mitchell Buick & Oldsmobile Sales, Inc. v. McHenry Savings Bank*, 235 Ill.App.3d 978, 982, 601 N.E.2d 1360, 1364 (1992). The Comment to § 4-406 refers to § 1-204, a provision that declares that "[w]henever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement." 801 ILCS 5/1-204.

The Bank asserts that Hausman agreed to define its duty of "reasonable promptness" to notify the Bank of unauthorized charges by consenting to a contract (the Account Agreement) that specified 30 days as the period within which it was required to notify the Bank of any unauthorized charges. It argues that Hausman's failure to notify the Bank within the contractual time frame precludes it from suing the Bank, as provided by § 4-406(d). Hausman argues that it never consented to the Account Agreement. Indeed, it denies any knowledge of the Account Agreement.

Illinois courts have consistently enforced account agreements as part of the contract between a bank and its customers. It is a fundamental principle of banking law that the relationship between a bank and its depositor is created and regulated by the express or implied contracts between them. *Symanski v. First National Bank of Danville*, 242 Ill.App.3d 391, 394, 609 N.E.2d 989, 991 (1993) (citing *Bieze v. Coca*, 54 Ill.App.3d 7, 15, 369 N.E.2d 106, 112 (1977)). In *Symanski*, a bank had set off deposits in a certificate of deposit jointly held by a husband and wife against debts of the husband. In reversing

summary judgment for the bank, the court held that the "contractual agreement between plaintiff and defendant in this case integrated several documents, including the CDs, the signature card/time deposit agreement, and the rules and regulations governing the account." *Symanski*, 242 Ill.App.3d at 394, 609 N.E.2d at 991. The Illinois Supreme Court, in *Suburban Bank of Hoffman-Schaumburg v. Bousis*, 144 Ill. 2d 51, 578 N.E.2d 935 (1991), held in similar fashion, finding that the contract between bank and customer "integrated several documents, including a signed signature card, the deposit slips for the account, the receipt for the initial deposit, and a copy of the rules and regulations governing the account." *Id*, 144 Ill.2d at 62, 578 N.E.2d at 941. *See also, e.g., Your Style Publications, Inc. v. Mid Town Bank & Trust Co. of Chicago*, 150 Ill.App.3d 421, 427-28, 501 N.E.2d 805, 809-10 (1986) (contract between the customer and bank included bank's rules and regulations as well as the signature card); *Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567, 570-71 (Minn. 1997) (contract between bank and customer included notification deadline in "Draft Withdrawal Agreement"). This authority suggests that Illinois courts would consider the contract between the Bank and Hausman by integrating the Corporate Resolutions and the checking Account Agreement. In this case, unlike *Symanski* and *Stowell*, there is no evidence that Hausman signed the documents in question, but this distinction does not make a difference. A party who fails to object to terms of a contract proposed by the other party accepts them upon performance under the contract. *McKee v. First National Bank of Brighton*, 220 Ill.App.3d 976, 981, 581 N.E.2d 340, 343 (1991).

Hausman disputes that it ever received the Account Agreement and claims that the Bank has "not offered a scintilla of evidence that such an agreement existed." In fact, the Bank has offered evidence demonstrating that it sent the Account Agreement and monthly statements to Hausman. Evidence "of the

routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the . . . routine practice." FED. R. EVID. 406. The Bank has provided the Kyros affidavit, in which the affiant testifies to the Bank's "routine and consistent practice" of sending Account Agreements to new customers. Furthermore, Richard P. Shelton, a vice president of the Bank, stated in an affidavit that it was the Bank's routine and consistent practice to send monthly statements to Hausman "on the third business day of the following month." Defendant's Motion for Summary Judgment, Exhibit E. Shelton also stated that Hausman's monthly statements for January 1998 and November 1997 would have been sent by the Bank on February 4, 1998, and December 3, 1997, respectively. Furthermore, Hausman's Sworn Statement of Proof of Loss, dated September 15, 1998, reveals that Hausman's investigation into Miller's defalcation included reviewing the canceled checks that Hausman received from the Bank in June 1998, as well as examining the July statement that arrived on August 10, 1999.[1]

Hausman's "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," fail to raise a genuine issue disputing the Bank's evidence that it sent Hausman the Account Agreement and monthly statements. The Guth affidavit states only that Guth is "not aware of any document governing the Account, other than Hausman Corporate Resolutions and Hausman letters designating authorized signatories." Plaintiff's Response Brief, Exhibit 5. Nowhere in her affidavit does Guth dispute that Hausman received the Account Agreement or monthly statements.

In sum, the terms of the contract between the Bank and Hausman are defined by the Account

[1]Previously, Miller had been intercepting the account statements.

Agreement, Corporate Resolutions, and monthly statements. The 30-day reporting deadline is accordingly a part of Hausman's contractual obligations, and Hausman's failure to notify the Bank within that period precludes Hausman (and the plaintiff) from suing the Bank under § 4-406(d). The Bank is therefore entitled to judgment as a matter of law. *Independent Construction Equipment Builders Union v. Hyster-Yale Materials Handling, Inc.*, 83 F.3d 930, 932-33 (7th Cir. 1996) (noting that summary judgment is appropriate when unambiguous contracts are being interpreted).

This holding comports with expressed policy desires of Illinois courts, as well as time-honored principles of contract law. In *Euro Motors, Inc., v. Southwest Financial Bank & Trust Co.*, 297 Ill.App.3d 246, 696 N.E.2d 711 (1998), the court declined to allow a bank customer's lawsuit to proceed, given that customers "generally have a comparative advantage over financial institutions to prevent diversion of company funds by their own employees." *Id.* at 252, 696 N.E.2d at 715 (citing *Menichini v. Grant*, 995 F.2d 1224 (3d Cir. 1993)). The UCC allocates risk to the party best able to minimize it, and "the public would be poorly served by a rule that effectively shifted the responsibility for careful bookkeeping away from those in the best position to monitor accounts and employees." *Id*. (citing *Haddad's of Illinois, Inc. v. Credit Union 1 Credit Union*, 286 Ill.App.3d 1069, 678 N.E.2d 322 (1997)). The *Euro Motors* court did state that the UCC would not bar a bank customer's lawsuit for unauthorized checks if the customer discovered and reported such checks within one year. *Euro Motors*, 297 Ill.App.3d at 253, 696 N.E.2d at 716. But in this case, the parties modified their obligations under the UCC; Hausman agreed to shoulder the responsibility of reviewing statements within 30 days after each statement. This comports with the principle that risk should be allocated to the party best able to limit the danger of loss.

Illinois courts have held that parties can limit remedies and damages for breach if their agreement so states and no public policy bar exists. *Rayner Covering Systems, Inc. v. Danvers Farmers Elevator Co.*, 226 Ill.App.3d 507, 512, 589 N.E.2d 1034, 1037 (1992). This comports with the "wide-spread policy of permitting competent parties to contractually allocate business risks as they see fit." *McClure Engineering Associates, Inc. v. Reuben H. Donnelley Corp.*, 95 Ill.2d 68, 72-73, 447 N.E.2d 400, 403 (1983) (collecting cases).[2] *See also Stowell*, 557 N.W.2d at 569 (noting that it is an "industry-wide practice [to rely] on the account holders to examine the statement each month and contact the [bank] if they identify any unauthorized checks").

The single argument advanced by plaintiff in its response brief and motion for summary judgment is that the Account Agreement was not part of Hausman's agreement with the Bank and that Hausman was not subject to the 30-day notification deadline. But we have rejected this argument; the Bank has demonstrated that the Account Agreement was part of the parties' contract, and plaintiff has failed to show that a genuine fact issue exists on that score. Because it is undisputed that Hausman failed to report the unauthorized signatures within 30 days of receiving its statements, the Bank is entitled to entry of summary judgment.

CONCLUSION

[2] *See also Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 258 (7th Cir. 1998) ("Contracts allocate risks, and judicial decisions changing those allocations after the fact not only lead to expensive litigation (as each side invests in the pursuit of advantage) but also make the institution of contract less useful ex ante.").

As the party best able to control its employees' fraud, Hausman agreed to bear the risk of unauthorized signatures. Under UCC § 4-406(d)(2), its failure to notify the Bank of the unauthorized signatures within 30 days of receiving its account statements precludes it from suing the Bank for the Bank's alleged breach of its contractual duty not to honor checks bearing unauthorized signatures. The Bank's motion for summary judgment [17-1] is therefore granted. Plaintiff's motion for summary judgment [28-1] is denied. Plaintiff's motion to present expert testimony [14-1] is terminated as moot. The Clerk is directed to enter judgment in favor of the defendant.

Dated: January 24, 2001

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MATTHEW F. KENNELLY
United States District Judge